No. 80-1598

Office-Supreme Court, U.S.
FILED
MAR 20 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1980

ROBERT BOWMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK and
McCORMACK & DAMIANI
Attorneys for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

4333 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by virtue of the fact that his conviction was obtained as a result of unexpected and unanticipated evidence after an assurance by the prosecutor that no such evidence existed, *i.e.*, a document known as Exhibit 7 (Fifth Amendment, United States Constitution)?

2. Whether petitioner was improperly indicted on two counts of perjury when in actuality the grand jury was obviously investigating a single continuing crime and, consequently, only one count should have been returned?

3. Whether under the doctrine of multiplicity, the *nisi prius* court should have dismissed one of the two counts of the indictment since both counts really charged only a single offense?

4. Whether the questions posed to petitioner in the grand jury were material to the investigation?

5. Whether the petitioner received a fair trial?

PARTIES

The parties in the United States District Court and the United States Court of Appeals were Robert Bowman, defendant-appellant, petitioner herein, and the United States of America, respondent. There have been no change in parties.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	i
Table of Contents	ii
Table of Citations	iii
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2

Reasons for Granting the Writ:

I. The testimony of petitioner before two separate sittings of the grand jury was not palpably false on its face, the *nisi prius* court's denial of motions to dismiss the indictment was, therefore, error. This is reinforced by the fact that in any event Bowman's testimony was not material to the matters under investigation by the grand jury. 9

II. Petitioner was treated unfairly by the prosecutor. Not only was his indictment predicated upon insufficient matter and insufficent evidence in the grand jury to say nothing of hearsay, but in addition, the tactics of the Government at trial prejudiced

Contents

Page

Bowman when they suddenly and without prior notice produced Exhibit 7 which tended to corroborate the testimony of the important witness Spinale. This occurred after the prosecutor had assured petitioner's counsel that there were no exhibits. 19

III. Since the indictment herein really charged a single offense in two separate counts, the doctrine of multiplicity should have compelled the trial judge to at least dismiss the second count, even assuming, *arguendo*, that the first count was viable. 25

A. The court erred in not granting the motions of the defense and exacerbated this error by refusing to charge the jury on the issue of "value" of any item given to Bowman. 29

Conclusion 29

TABLE OF CITATIONS

Cases Cited:

Barbee v. Warden, 331 F. 2d 842 (4 Cir. 1964) 19

Bell v. United States, 349 U.S. 81 (1955) 27

Blair v. United States, 250 U.S. 273, 63 L. Ed. 2d 979 ... 11

Branzburg v. Hayes, 408 U.S. 665, 33 L. Ed. 2d 626 11

Contents

Page

Bronston v. United States, 409 U.S. 352, 93 S. Ct. 595 (1973) 15

Coopedge v. United States, 369 U.S. 438 22

Dunn v. United States, 442 U.S. 100, 99 S. Ct. 2190 (1979) 15

Gebhard v. United States, 422 F. 2d 281 (9th Cir. 1970) .. 27

Hale v. Henkel, 201 U.S. 43 11

In re Snow, 120 U.S. 274 (1887) 27

Markham v. United States, 160 U.S. 319 (1895) 13

Masima v. United States, 296 F. 2d 871 (8th Cir. 1961) .. 28

Mesarosh v. United States, 352 U.S. 1 23

Napue v. Illinois, 360 U.S. 264 19

North Carolina v. Pearce, 395 U.S. 711 (1969) 26

Rewis v. United States, 401 U.S. 808 (1971) 16

Sibron v. New York, 392 U.S. 40 (1968) 28

Sinclair v. United States, 279 U.S. 263 (1929) 10

United States v. Aloisio, 440 F. 2d 705, cert. denied, 404 U.S. 824 (7 Cir.) 20

Contents

Page

United States v. Archer, 486 F. 2d 670 (2d Cir. 1973) 16, 17, 18

United States v. Arcuri, 405 F. 2d 691 (2 Cir. 1968), cert. denied, 395 U.S. 913 20

United States v. Bass, 404 U.S. 336 (1971) 16

United States v. Baum, 482 F. 2d 1325 (2 Cir. 1973) 21

United States v. Benedetto, 571 F. 2d 1246 (2 Cir. 1978).. 20

United States v. Birrell, 470 F. 2d 113 (2 Cir. 1972) ... 12, 13

United States v. Cobert, 227 F. Supp. 915 (S.D. Cal. 1964) 15

United States v. Cook, 489 F. 2d 286 (9th Cir. 1973) 15

United States v. De Cicco, 435 F. 2d 478 (2 Cir. 1970) ... 20

United States v. Di Guanzia, 213 F. Supp. 232 (Ill. 1973).. 24

United States v. Dixon, Docket No. 75-1317 (2d Cir. March 12, 1976) 27

United States v. Doulin, 538 F. 2d 466 (2 Cir. 1976) ... 11, 27

United States v. Doulin, 538 F. 2d 466 (2d Cir.), cert. denied, 429 U.S. 895 (1976) 10, 11

United States v. Dunn, 577 F. 2d 119 (10 Cir. 1978) 15

Contents

Page

United States v. Esposito, 358 F. Supp. 1032 (N.D. Ill. 1973) 15

United States v. Estepa, 471 F. 2d 1132 (2 Cir.) 20

United States v. Freedman, 445 F. 2d 1220 (2d Cir. 1971).. ..... 10, 11, 12, 13

United States v. Gibson, 310 F. 2d 79 (2 Cir. 1962) 25

United States v. Goodman, 285 F. 2d 378 (C.A. 5 1960), cert. denied, 366 U.S. 930 25

United States v. Gregory, 369 F. 2d 185 (D.C. Cir. 1966).. 21

United States v. Gubelman, 571 F. 2d 1252 (2 Cir. 1978).. 20

United States v. Koonce, 485 F. 2d 374 (8th Cir. 1973) .. 16

United States v. Laikin, 583 F. 2d 968 (3 Cir. 1978) 16

United States v. Lattimore, 127 F. Supp. 405 (D.D.C. 1955) 15

United States v. Laut, 17 F.R.D. 31 (S.D.N.Y. 1955) 13

United States v. Lazaros, 480 F. 2d 174 (6th Cir. 1973) .. 28

United States v. Lubomski, 277 F. Supp. 713 (D.C. Ill. 1967) 25

United States v. Mancuso, 485 F. 2d 275 (2d Cir. 1973) 10, 13, 28

Contents

Page

United States v. Mamber, 127 F. Supp. 925 (D. Mass. 1955) 28

United States v. Marchisio, 344 F. 2d 653 (2d Cir. 1965).. 11

United States v. Maze, 414 U.S. 395 (1974) 16

United States v. McFarland, 371 F. 2d 701 (2d Cir. 1966), cert. denied, 387 U.S. 906 (1967) 11

United States v. O'Connor, 580 F. 2d 38 20

United States v. Pastor, 419 F. Supp. 1318 (D.C.N.Y. 1976) 20

United States v. Poole, 379 F. 2d 645 (7 Cir. 1967) 19

United States v. Remington, 191 F. 2d 246 (2 Cir. 1951), cert. denied, 343 U.S. 907 23

United States v. Stone, 429 F. 2d 138 (2d Cir. 1970) 10

United States v. Tavoularis, 515 F. 2d 1070 (2d Cir. 1975).. 16

United States v. Taylor, 464 F. 2d 240 (2 Cir. 1972) ... 24, 25

United States v. Toscanino, 500 F. 2d 267 (2d Cir. 1974).. 16

United States v. Wall, 371 F. 2d 398 (6th Cir. 1967) 15

United States v. Whitted, 325 F. Supp. 520 (D.C. Neb. 1971) 24

Contents

Page

Statutes Cited:

18 U.S.C. §152 2

18 U.S.C. §1623 ..... 2, 14

18 U.S.C §1951 2

28 U.S.C. §1254(1) 2

United States Constitution Cited:

Fifth Amendment ..... i, 2

Rules Cited:

Federal Rules of Criminal Procedure:

Rule 4 26

Rule 8 25

Other Authorities Cited:

American Bar Association Standards on the Prosecution and Defense Function, Sections 5.6(a) and 7.5(a) 20

Annot., 14 A.L.R. 3d 1272 (1967) 28

Note, Civil Disability of Felons, 53 Va. L. Rev. 403 (1967) 28

Contents

Page

Note, Collateral Consequences of a Criminal Conviction, 23 Va. L. Rev. 929 (1970) 28

APPENDIX

Relevant Constitutional and Statutory Provisions 1a

No.

In The

Supreme Court of the United States

October Term, 1980

ROBERT BOWMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The United States Court of Appeals for the Second Circuit rendered no written opinion in its affirmance of the judgment of conviction except that an oral opinion was articulated in open court, the contents of which have never been reduced to writing. The decision of the United States Court of Appeals was rendered the 29th day of January, 1981 and the judgment of conviction of the District Court was rendered the 30th day of September, 1980.

JURISDICTION

(a) The judgment of the United States District Court convicting petitioner of two counts of perjury after trial before

Honorable George Pratt, D.J. and a jury was rendered the 30th day of September, 1980.

(b) By order made the 29th day of January, 1981, the United States Court of Appeals unanimously affirmed the judgment of conviction (Van Graafeiland, Kearse, Circuit Judges and Bramell, D.J.).

(c) Jurisdiction to review the judgment in question by certiorari is conferred under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Due Process Clause of the Fifth Amendment of the United States Constitution; statutory provisions involved are 18 U.S.C. §§152, 1623, 1951 (*see* Appendix, *infra).*

STATEMENT OF THE CASE

Petitioner Robert Bowman, was summoned before a grand jury in the Eastern District of New York in October, 1979. He was again summoned to appear before the grand jury in May of 1980. The indictment which was ultimately returned following his second appearance before the grand jury charged him *inter alia* with giving false testimony in that his answers in response to certain questions during each appearance was false.

In May of 1980 the petitioner was allegedly given an opportunity to "recant" certain statements which he had made in October of 1979, but refused to do so on the grounds that he was telling the truth.

The petitioner, we maintain, was, therefore, indicted upon matters of which the grand jury itself was unaware until substantially after his second appearance before the grand jury. This is so because the Government called several witnesses such

as Richard Celeiro following petitioner's second appearance before the grand jury in an effort to establish the falsity of some of his testimony before the grand jury.

The foreman of the grand jury, Neil Schwartz, testified that the grand jury in October of 1979 was conducting a so-called "John Doe" inquiry as to whether any federal crimes of arson, bankruptcy, fraud and the like had been committed. The investigation centered around the fruit and produce businesses, some of which were located in Rockland County, New York. The grand jury heard about fifty to sixty witnesses. Bowman had been asked during his first appearance about alleged bribes which were under investigation, but Bowman categorically denied any knowledge of these items.

Petitioner was resummoned before the May, 1980 sitting of that same grand jury so as to grant him an opportunity to "recant" his testimony that he was unaware of any bribes. Since Bowman asserted that he had been telling the truth, there was no "recantation."

Schwartz, the foreman, admitted that petitioner was only being investigated for "bribes."

In May, 1980, however, the grand jury had been informed of a shift in emphasis of the investigation to include so-called "RICO" violations in addition to racketeering.

In May of 1980 certain witnesses, upon whose testimony petitioner was ultimately indicted for perjury, had not yet even testified and, consequently, when petitioner left the grand jury in May of 1980 there was not yet a predicate for the ultimate indictment which was returned except for questionable evidence from so-called cooperating Government witnesses. Later witnesses, such as Celeiro, were called and the aforesaid indictment was returned.

It is obvious that until the later witnesses were called the falsity of Bowman's responses were unknown and it is difficult to understand how it can be said that he committed perjury in May of 1980 since it is necessarily a retrospective determination.

At the trial itself the prosecutor conceded that the only issue in the case was the alleged false answers of the petitioner (65).[1]

Archibald Malcolm Chuicchini, testifying for the prosecution, said that he, together with his father-in-law, ran a Farmer's Market on Congers Road and Route 304 in Clarkstown, Rockland County. Frank Spinale, his father-in-law, was the manager and overseer of this business (119-123). He stated that he had testified in the grand jury but was told that he was not a target of its investigation. This was because he was cooperating with the Government (124-130).

Although he stated that no promises had been made to him, nevertheless, because of his cooperation he was not prosecuted for certain crimes. He stated that petitioner was a building inspector in the Town of Clarkstown and that Spinale told him that he would have to pay the petitioner $500 in cash (128-135).

Chuicchini asserted that payments were made on at least two or three occasions (135-136).

Bowman, Chuicchini recalled, was the building inspector, and he admitted that there were several obvious building violations at the time that Bowman came to his establishment (136).

Chuicchini further conceded that he had lied, on advice of his attorney, before the grand jury (158-159).

He further conceded that he was the ex-son-in-law of Spinale, since he and Spinale's daughter had divorced (160).

Chuicchini asserted that he, personally, was not present when certain money was given to the petitioner but he was present when money was placed into an envelope which allegedly was turned over to the petitioner by someone else (173).

---

1. Numerals in parentheses refer to pages of the official court reporter's minutes of trial unless otherwise indicated.

Moreover, he stated that he gave $500 to one "Valente" who was supposed to give it to the petitioner but Chuicchini expressed grave doubts that Valente ever paid this money to the petitioner (181-182).

The petitioner himself never asked Chuicchini for money while he was at "Archie's Acres, Inc.", although he admitted there were several violations visible to the naked eye (201).

In October of 1976, Chuicchini asserted that he, himself, handed the petitioner an envelope while Padovani, an employee, was present, but this was the only time he ever handed money to Bowman (204-206). He conceded, however, that there was nothing in the grand jury testimony that he gave that said anything about handing money to the petitioner, other than on that one occasion (208-209).

In view of Chuicchini's admitted prior perjury, the court should not have permitted the case to go to the jury.

Chuicchini conceded that he himself had not been prosecuted for perjury, despite his admission that he committed perjury, supposedly on the advice of his attorney (Joseph Perviti) (213).

On a later date, Chuicchini recalled that he gave an envelope to Padovani which was supposed to be given to the petitioner, but the envelope was returned undelivered (227).

Chuicchini stated that he was fairly certain that certain moneys given to Valente were probably never turned over to the petitioner (230).

Angelo Padovani revealed that he was presently employed by the Parks Department and Schools of the Town of Clarkstown, but had worked at "Archie's Acres" as a cook. On one occasion, he stated, he was given an envelope to give to the petitioner (236). On another occasion, an envelope with money in it, supposedly to be delivered to the petitioner, was never actually delivered and had to be returned to his boss, Chuicchini, who had given him the envelope in the first place

(240-245). He said that on one occasion he observed trucks come to the premises of "Archie's Acres" and remove virtually everything from the premises (247-248). This testimony related to the bankruptcy fraud committed by Chuicchini and Spinale, and was really irrelevant to the case in chief, except that it showed the criminal bent of the witnesses, Chuicchini and Spinale, which is still irrelevant to this indictment.

Frank Spinale testified that he had been the father-in-law of Archibald Chuicchini and that he himself had been indicted for racketeering and that he had made an agreement with the United States Attorney's office that if he pleaded guilty to one count of bankruptcy fraud, he would not otherwise be prosecuted (2.5-2.11).

In 1974, he stated that his son-in-law, with him as manager, opened a fruit market in Rockland County known as "Archie's Acres" (2.14).

When that business opened he met the petitioner, who identified himself as a building inspector and gave Bowman $500 in cash on the first day of business (2.16-2.23).

It was only on this opening day that he can be certain that he ever gave money to the petitioner (2.25).

Although the prosecution had stated no documents were to be offered in evidence, and thus gave no pretrial discovery, nevertheless, the witness Spinale testified that he had "suddenly" found a document the day before he testified, which became "Government's Exhibit 7", which, over objection, was ultimately admitted against the petitioner. These were notes allegedly made contemporaneously, or almost contemporaneously, by Spinale at the time of the opening of "Archie's Acres", which included items of expenses embracing the $500 allegedly given to the petitioner (2.33, 2.121, 2.134).

The court, incidentally, denied a requested continuance to the petitioner, because of this unexpected evidence (2.122-2.124).

Spinale also stated that petitioner had an interest in "Tony's Lobster House", and that occasionally he took fruits and vegetables from "Archie's Acres" without paying therefor, to bring to "Tony's Lobster House" (2.127-2.130).

Richard Celeiro testified that he was a butcher and chef by trade and that he had operated a restaurant in Rockland County at one time (2.150-2.157). He asserted that he had had problems with petitioner Bowman, who was the building inspector, and that as a result of that, retained a lawyer by the name of Don Tracy (2.157-2.158).

Allegedly the petitioner was giving him a difficult time about the amount of cars that could be parked at his restaurant. Tracy allegedly told Celeiro that he would have to give $1,000 in cash to the petitioner and, consequently, asked for a $1,500 retainer for himself and $1,000 cash supposedly for Bowman (2.161). This money was given to Tracy in the latter's office, but prior to it being given, Tracy had ordered Celeiro's wife to leave the room (2.162).

Celeiro asserted that he later encountered Bowman, who admitted that Tracy had given him $500 (2.171). Celeiro recalled that Bowman had ordered him to reduce the seating capacity in his restaurant, coupled with the difficulty in parking spaces, which Celeiro said resulted in his ultimately going bankrupt (2.171, 2.172).

Donna Lee Celeiro asserted that she recalled Tracy asking her to leave the room when her husband supposedly gave him the money for Bowman (2.236-2.237). Moreover, she asserted that she was told by someone that Tracy "was the man to see" to help with Bowman (2.240).

A handwriting expert by the name of Mrs. Frankel testified concerning handwriting exemplars and doubted that certain writings containing the name "Bowman" were in fact written as claimed (3.181). She said the handwriting differed from Spinale's.

Robert Bowman, testifying in his own behalf, stated that he had two children, was married, had spent over one and a half

years in the Army and two years in college, and had a background as a builder. In 1970 he became a building inspector in Clarkstown and he was responsible for the enforcement of certain building codes (3.14). He asserted that his duties were strictly ministerial and that he had no discretion to vary any of the codes or zoning ordinances (3.221).

He stated that he recalled a problem at Celeiro's restaurant concerning seating capacity and parking, but that he could do nothing about it because he had to enforce the building and zoning ordinances strictly (3.219, 3.226, 3.228). He asserted that Celeiro had signed an affidavit that only 140 seats would be used, but then improperly included 200 seats in the restaurant (3.229, 3.230).

Bowman asserted that he knew Don Tracy and had worked with him at one time, because Tracy had been counsel to the Zoning Board (3.256).

The petitioner categorically denied that he had received money or anything of value from Spinale, Chuicchini, or anyone else (3.274-3.275).

Chester Lubeck testified that he had made the applications on behalf of Celeiro for variances and building permits (2.265).

Hartford Kittel, an F.B.I. agent specializing in handwriting, examined "Exhibit 7", which was the handwritten notes of the witness Spinale, and said that it was impossible to tell when "Bow" and "man" had been written — it could have been four years ago or yesterday (4.159).

He also stated that there were unexplained variations in the name "Frank Spinale" and "Frank P. Spinale" (4.161, 4.164).

Don Tracy testified for the defense and categorically denied ever taking cash or any other money to give to Bowman, but said he only received his own fee of $1,500 from Celeiro (3.48-3.59).

David Mellon, a police officer with the Town of Clarkstown, said that Mrs. Celeiro had complained about certain parking problems she had. She never mentioned anything about bribery.

Martin Pignatelli, also a police officer in Rockland County, stated that there were many traffic complaints on Route 304 about people trying to enter and leave "Archie's Acres". He had never seen the petitioner get any white envelopes in the parking lot near the police station (3.164).

The police testimony revealed that the petitioner did not own any restaurant in Rockland County and that they were unaware of any restaurant in which he may have had an interest.

The petitioner himself had denied all allegations of obtaining free produce for "Tony's Lobster House".

REASONS FOR GRANTING THE WRIT

I.

THE TESTIMONY OF PETITIONER BEFORE TWO SEPARATE SITTINGS OF THE GRAND JURY WAS NOT PALPABLY FALSE ON ITS FACE. THE *NISI PRIUS* COURT'S DENIAL OF MOTIONS TO DISMISS THE INDICTMENT WAS, THEREFORE, ERROR. THIS IS REINFORCED BY THE FACT THAT IN ANY EVENT BOWMAN'S TESTIMONY WAS NOT MATERIAL TO THE MATTERS UNDER INVESTIGATION BY THE GRAND JURY.

The petitioner had been subpoenaed before a grand jury in the Eastern District of New York in October of 1979 and then again in May of 1980 — specifically, October 9, 1979 and May 6, 1980, respectively. The indictment indicates that the grand jury was conducting an investigation "into possible violations of the United States laws prohibiting bankruptcy fraud . . . and other federal statutes with a purpose of determining whether any persons had violated such statutes." The aforesaid language pertains to Count One of the indictment.

The grand jury was also inquiring as to whether the bankrupt corporation known as "Archie's Acres, Inc." had been unlawfully dissipated prior to the bankruptcy; and "in particular whether assets had been used for illegal payments to public officials."

Count Two of the indictment differed from Count One in that it declares that the grand jury was investigating "prohibiting false declarations before a grand jury" and "obstruction of commerce by extortion".

On both of his appearances before the grand venire, the petitioner testified completely and was asked on both occasions whether he had accepted money from certain individuals including Angelo Padovani, Archie Chuicchini, Frank Spinale and Richard Celeiro. In all circumstances Bowman categorically denied that he had done so.

It is not disputed that very little testimony before the grand jury had been adduced incriminating the petitioner until after his second appearance.

Since the May 6, 1980 appearance before the grand jury was to determine whether petitioner had lied during the October 9, 1979 appearance, it was improper and immaterial to discuss with him anything concerning extortion, "RICO" violations, or the like, since that was never the subject of his subpoena nor of the investigation about which he was testifying in October of 1979.

It appears, from the record, that many witnesses testified after the last appearance of the petitioner before the grand jury.

Materiality is an essential element to be established by the Government in proving the offense charged in each count of the indictment. *United States v. Mancuso,* 485 F. 2d 275, 280 (2d Cir. 1973); *United States v. Stone,* 429 F. 2d 138, 140 (2d Cir. 1970); *United States v. Freedman,* 445 F. 2d 1220, 1227 (2d Cir. 1971). It is also clear that the materiality of the allegedly false declarations is strictly a matter of law to be determined by the court. *Sinclair v. United States,* 279 U.S. 263, 298-99 (1929); *United States v. Doulin,* 538 F. 2d 466, 470 (2d Cir.), *cert.*

denied, 429 U.S. 895 (1976); *United States v. McFarland,* 371 F. 2d 701, 703 n.3 (2d Cir. 1966), *cert. denied,* 387 U.S. 906 (1967); *United States v. Marchisio,* 344 F. 2d 653, 665 (2d Cir. 1965).

The Second Circuit has established clear standards for making determinations with respect to the materiality of allegedly false statements:

> "We do not believe and it is not seriously argued, that every knowingly false statement under oath is perjurious, for such a ruling would eliminate the materiality requirement. *In order for a knowingly false statement to be material . . . it must be shown that a truthful answer would have been of sufficient probative importance so that at a minimum further fruitful investigation would have occurred.*" *United States v. Freedman,* 445 F. 2d at 1226-27 (citations omitted) (emphasis added).

It is, of course, true that no grand jury, including those which examined petitioner, is granted an unlimited charter. Thus, a grand jury may not conduct an investigation in the nature of a meddlesome inquiry (*Hale v. Henkel,* 201 U.S. 43).

Its powers are ultimately "subject to the supervision of a judge," (*Branzburg v. Hayes,* 408 U.S. 665, 688, 33 L. Ed. 2d 626).

On the other hand, a realistic appraisal of the grand jury's task compels recognition of the fact that at least at the outset, the eventual scope and direction of its inquiry is often only hazily perceived and tentatively defined (*Blair v. United States,* 250 U.S. 273, 282, 63 L. Ed. 2d 979).

In *United States v. Doulin,* 538 F. 2d 466 at 469, 470 (2 Cir. 1976), the court explained:

> "It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of

criminal activity, so that the investigation can be complete. This is true whether the grand jury embarks upon an inquiry focused upon individuals suspected of wrongdoing, or is directed at persons suspected of no misconduct but who may be able to provide links in a chain of evidence relating to criminal conduct of others, or is centered upon broader problems of concern to society. It is entirely appropriate indeed imperative—to summon individuals who may be able to illuminate the shadowy precincts of corruption and crime. (Emphasis added.) *United States v. Mandujano,* 425 U.S. 564, 96 S. Ct. 1768, 1775, 48 L. Ed. 2d 212 (1976).

The Congressional decision to restrict the coverage of §1623 to 'false material declaration[s]' thus reflects an accommodation of two competing values: It is designed to give the grand jury the latitude necessary to perform its salutary role while at the same time safeguarding the rights of the individual against state encroachment. To effectuate these twin goals, the now well-settled test of maturity, first expressed by this court in *Carroll v. United States,* 16 F. 2d 951, 953 (2d Cir.), cert. denied, 273 U.S. 763, 47 S. Ct. 477, 71 L. Ed. 880 (1927), is whether the perjurious testimony has 'a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation.' A conviction under §1623 may therefore be sustained upon a showing that a truthful answer to the grand jury's question could conceivably have furthered its inquiry by providing 'an evidentiary stone in the larger edifice.' *United States v. Mancuso,* 485 F. 2d 275 (2d Cir. 1973)."

In *United States v. Freedman,* 445 F. 2d 1220, 1227 (2 Cir. 1971), and *United States v. Birrell,* 470 F. 2d 113, 115, n.1 (2 Cir. 1972), the Government was required to prove that further

fruitful investigation would have occurred had a truthful answer been given in order to carry out its burden to establish materiality.

While neither *Freedman* nor *Birrell* specifically referred to grand jury proceedings, there is no reason why the same standards should not be maintained. (*cf., United States v. Mancuso,* 485 F. 2d 275 at 280.)

We maintain further that the indictment fails to allege any material connection except as a conclusion between the testimony sought from the petitioner and the "matters directly in issue".

The failure to allege any such material connection, except as a conclusion or to "tie" the allegedly false statements to the "matters directly in issue" is necessarily "fatal" to a subsequent prosecution for such allegedly false statements (*United States v. Freedman,* 445 F. 2d at 1227).

The conclusory allegation that the testimony concerning payments allegedly made to petitioner were material is clearly insufficient.

> "[I]t 'is undoubtedly necessary that it should appear *on the face of the indictment* that the false allegations were *material to the matter in issue. . . . The facts set forth as falsely . . . sworn to should be sufficient in themselves to show such materiality.'" United States v. Laut,* 17 F.R.D. 31, 35 (S.D.N.Y. 1955) (emphasis added) [citing *Markham v. United States,* 160 U.S. 319, 325 (1895)].
>
> "*Such facts may 'not be left to surmise or to be reached by way of inference or argument.'* And, where false statements charged are not even probably material, *the indictment may be dismissed without putting defendant to the mere ceremony of trial."* 17 F.R.D. at 35-36 (citations omitted) (emphasis added).

The perjury in this case is not spelled out at all by a comparison of Bowman's testimony on October 9, 1979, before the grand jury and his subsequent appearance on May 6, 1980.

If there is perjury at all. it necessarily had to rest upon dichotomies and discrepancies between his testimony on those two dates.

Apparently recognizing that no viable indictment could be sustained predicated upon a comparison of Bowman's testimony on his two appearances before the grand jury, the prosecutor called witnesses *subsequent* to Bowman's appearance and elicited testimony from cooperating witnesses, such as Richard Celeiro, that he had in fact received payments from them. This, we maintain, was unfair and also was not within the predicate of the grand jury's investigation as spelled out in Bowman's October 9, 1979 and May 6, 1980 appearances. In fact, the grand jury obviously had no such testimony before it on October 9, 1979 or May 6, 1980, and, consequently, the indictment which charges that the witness gave false testimony on those dates cannot be supported by anything extant in the grand jury minutes up to May 6, 1980.

Thus, we perceive the subsequent testimony of such witnesses as Celeiro and others to have been matters *ancillary* to the grand jury investigation of Bowman.

Since the indictment and the proof at trial both concerned petitioner's testimony in his two appearances before the grand jury, we maintain that a conviction cannot be sustained by virtue of testimony adduced subsequent to the petitioner's last appearance before the grand jury, within the meaning of 18 U.S.C. §1623.

Both the language and legislative history of the statute indicate that Congress contemplated a more formal proceeding than that which occurred here. The petitioner received no notice that there had been testimony contrary to his allegations, since there had been no such testimony up to that time. We maintain, therefore, that this indictment does not come within the meaning

and congressional intent of 18 U.S.C. §1623 [*Dunn v. United States*, 442 U.S. 100, 99 S. Ct. 2190 (1979), *reversing United States v. Dunn*, 577 F. 2d 119 (10 Cir. 1978)].

Moreover, since the grand jury had, presumably, received no evidence between October 9, 1979 and May 6, 1980 contradicting petitioner, coupled with the fact that the questions asked on the two different occasions were objectively not the same because presumably they involved two different investigations, the petitioner was giving "literally truthful" answers [*Bronston v. United States*, 409 U.S. 352, 93 S. Ct. 595 (1973)].

Under *Bronston v. United States*, 409 U.S. 352 (1973) the Supreme Court concluded that if the questions asked, leading to the allegedly perjurious answer, are not specific or if multiple interpretations can be drawn from the questions, there can be no perjury. *See also, United States v. Cook*, 489 F. 2d 286 (9th Cir. 1973); *United States v. Wall*, 371 F. 2d 398 (6th Cir. 1967); *United States v. Esposito*, 358 F. Supp. 1032 (N.D. Ill. 1973); *United States v. Cobert*, 227 F. Supp. 915 (S.D. Cal. 1964); *United States v. Lattimore*, 127 F. Supp. 405 (D.D.C. 1955).

In *Bronston*, the Court declared:

> "Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question — unless there is to be speculation as to what the unresponsive answer 'implies'" (409 U.S. 355 n.3).

The Supreme Court then went on to stress:

> "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry (citing authority)" (409 U.S. at 360).

As was held in *United States v. Laikin*, 583 F. 2d 968 (3 Cir. 1978), the Government cannot argue around a mistake it could have voided by proper procedures and proper predicates for the questions that were put to petitioner.

In *United States v. Koonce*, 485 F. 2d 374 (8th Cir. 1973), the court concluded that the Government must prove the materiality of a defendant's statement before the grand jury at the time of the indictment.

The court then went on to state:

> "Essentially, we are left with the allegations of the indictment, unsupported by proof at the trial. '[A] general allegation of materiality is sufficient and it is not necessary to encumber the indictment with, what would amount to be, the Government's argument why it believes the statements were material. *The Government, if it wishes to sustain its case, must prove, upon the trial of the case, why and how these particular statements were material*'" (citing authorities). (485 F. 2d at 37). (Emphasis ours.)

Here the Government had the duty of proving beyond a reasonable doubt the materiality of the question the petitioner allegedly answered falsely since the materiality was not apparent from the questions themselves. This was never accomplished.

Recently, the Supreme Court of the United States, and other circuits have brought a halt to the alarming trend of overextending federal criminal jurisdiction. *United States v. Maze*, 414 U.S. 395 (1974); *United States v. Bass*, 404 U.S. 336 (1971); *Rewis v. United States*, 401 U.S. 808 (1971); *United States v. Tavoularis*, 515 F. 2d 1070 (2d Cir. 1975); *United States v. Toscanino*, 500 F. 2d 267 (2d Cir. 1974); *United States v. Archer*, 486 F. 2d 670 (2d Cir. 1973).

This Court in *Archer* lashed out at federal prosecutors who contrived federal jurisdiction in order to herd their victims into

federal court, admonishing them against these tactics. In *Archer*, the court recognized:

> "There is no evidence that, at the time of the February 1972 meeting, the federal law enforcement officers had any information that the supposed corruption of the Queens County District Attorney's office involved violations of the Travel Act, 18 U.S.C. §1952; the hope was rather that if the playing of the Bario-Murano scenario would induce corrupt activity, some interstate or foreign element might occur or, if not, might be injected. Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds . . ." (486 F. 2d at 677).

In dealing with the *Archer* case, the court noted:

> "Although §207 of the Commission's Proposed Code, entitled 'Discretionary Restraints on Exercise of Concurrent Jurisdiction,' includes among the cases where 'a substantial federal interest exists' . . . it is not clear that this comprehends the case where federal investigators have no reason to suspect any violation of federal law. Even if the proposed code section was intended to cover such cases, we are not sure we would agree that the federal interest should extend that far" (486 F. 2d at 678).

Significantly, the court stressed in *Archer:*

> "While responsibility for keeping federal criminal investigations and prosecutions within the bounds appropriate on the assumptions inherent in a federal system should rest, in the first instance, with United States Attorneys . . . , we are not prepared to say that, absent Congressional limitation, a federal court may never dismiss a prosecution as an abuse of federal power . . ." *(Id.)*

The Government never sought certiorari in *Archer*.

Although in *Archer* the court reversed on other grounds, this language bears directly on the case at bar. The court did stress after carefully cataloging all the recent decisions where federal jurisdiction was based on flimsy grounds to say the least:

> "Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings (citing authority). [It] 'is a reflection on the federal judicial system and brings it into disrepute'" (486 F. 2d at 682).

Accordingly, the court concluded that the telephone calls utilized in *Archer* were "insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States" (486 F. 2d at 683).

Despite the court's carefully designed warning, Judge Friendly's melancholy forecast has all too soon been fulfilled. This case, more than any other, confirms our worst suspicions of how federal jurisdiction can be grossly overextended and the powers of federal grand juries grievously abused.

II.

PETITIONER WAS TREATED UNFAIRLY BY THE PROSECUTOR. NOT ONLY WAS HIS INDICTMENT PREDICATED UPON INSUFFICIENT MATTER AND INSUFFICIENT EVIDENCE IN THE GRAND JURY TO SAY NOTHING OF HEARSAY, BUT IN ADDITION, THE TACTICS OF THE GOVERNMENT AT TRIAL PREJUDICED BOWMAN WHEN THEY SUDDENLY AND WITHOUT PRIOR NOTICE PRODUCED EXHIBIT 7 WHICH TENDED TO CORROBORATE THE TESTIMONY OF THE IMPORTANT WITNESS SPINALE. THIS OCCURRED AFTER THE PROSECUTOR HAD ASSURED PETITIONER'S COUNSEL THAT THERE WERE NO EXHIBITS.

The witness Spinale had made a deal with the Government and was permitted to plead guilty to reduced charges in exchange for his cooperation.

The preparation for trial was preceded by discovery motions and representations were made to defense counsel that there were no exhibits. So, it was like "a bolt out of the blue" that the petitioner was suddenly confronted with an alleged written memo by the Government's witness Spinale indicating that he had made a $500 payoff to Bowman several years earlier. To say that this was "trial by ambush" would be an understatement. It was, in addition, obvious that Spinale had fabricated this item because he claimed to have blundered across it a day or so before he was to testify despite the fact that he had allegedly previously turned over everything he knew about the case.

We submit that the prosecutor should not have introduced the exhibit and that a full hearing should have been held before it was admitted [*see Napue v. Illinois*, 360 U.S. 264 and *United States v. Poole*, 379 F. 2d 645 (7 Cir. 1967)]. Indeed, some courts have granted new trials to defendants even where the prosecutor was unaware of the falsity of the evidence [*see Barbee v. Warden*, 331 F. 2d 842 (4 Cir. 1964)]. The use of evidence

which appears to be false or manufactured is contrary to the American Bar Association Standards on the Prosecution and Defense Function [Sections 5.6(a) and 7.5(a)].

As we have indicated previously, the prosecution had little hard evidence at all of perjury when the petitioner testified the second time before the grand jury on May 6, 1980. The fact that they may have had, and of necessity only could have had, hearsay declarations about possible perjury on the second count is insufficient to have warranted an indictment. In this circuit, the law is clear that where better evidence is available, it is not permissible for the prosecution to use hearsay. In the case at bar, they could have had the testimony of the witnesses such as Celeiro, which they did not have at the time of the second appearance by Bowman before the grand jury.

Accordingly, we maintain that under such cases as *United States v. Estepa,* 471 F. 2d 1132 (2 Cir.), *United States v. Aloisio,* 440 F. 2d 705, *cert. denied,* 404 U.S. 824 (7 Cir.), and *United States v. Arcuri,* 405 F. 2d 691 (2 Cir. 1968), *cert. denied,* 395 U.S. 913, the procedures followed here were improper.

The incisive opinion of Judge Weinstein in *United States v. Arcuri* in the District Court, 282 F. Supp. 347, is extremely instructive, especially since the court affirmed it. *See also, United States v. Pastor,* 419 F. Supp. 1318 (D.C.N.Y. 1976).

In addition, it appears herein that during the grand jury proceedings, the prosecutor, in essence, impugned the truthfulness of the witness testifying and thus prejudiced the petitioner. The result was to characterize the petitioner in essence as a "bad man", thereby encouraging the indictment. [*See United States v. O'Connor,* 580 F. 2d 38; *United States v. Benedetto,* 571 F. 2d 1246 (2 Cir. 1978); *United States v. Gubelman,* 571 F. 2d 1252 (2 Cir. 1978); and *United States v. DeCicco,* 435 F. 2d 478 (2 Cir. 1970)].

With respect to the sudden adduction of Exhibit 7, we believe that it is not believable that Spinale suddenly blundered across this material.

We maintain that it is not conceivable that this evidence was unknown to the prosecutor. It was, frankly, consistent with the conduct of the grand jury proceeding to have adduced this at trial. Similar types of what we describe as "unfair tactics" were employed.

In *United States v. Gregory,* 369 F. 2d 185 (D.C. Cir. 1966), the Court of Appeals aptly condemned such tactics, referring to them as an "evidential harpoon":

> ". . . The volunteering of inadmissible testimony prejudicial to the defendant has been condemned time and again by both state and federal courts. For example, in *Wright v. State,* Okl. Cr. App., 325 P. 2d 1089, 1093 (1958), where a law enforcement officer injected this type of prejudicial testimony, not twice as here, but only once, the court stated:
>
> 'This type of testimony has often been referred to as an "evidential harpoon" that has been wilfully jabbed into the defendant and then jerked out by an admonition to the jury not to consider the same. This court has never condoned, but often criticized a witness being intoxicated with eagerness in an all out effort to obtain a conviction. . . . Officers must be aware that an overzealous attitude is, in most instances, detrimental to the prosecution and often results in a retrial of the case at considerable expense to the state.' "[2]

Furthermore, this also smacked of a trial "by ambush" which the court has condemned time and again. In a case argued by the writer of this brief, *United States v. Baum,* 482 F. 2d 1325 (2 Cir. 1973), the court aptly observed that a reversal was warranted when the prosecutor suddenly revealed certain testimony which had not been disclosed to the defense previously and which in essence smacked of a trial "by ambush".

---

2. Here an experienced prosecutor did this.

> "The failure to reveal Greenhalgh's identity until he was presented as a witness, confronted the trial judge with the hard choice of interruption of the trial or denial to the defense of a reasonable opportunity of meeting the severe impact of this aspect of the prosecutor's evidence. Such tactics were condemned, and called for the reversal in *United States v. Kelly,* 420 F. 2d 26, 29 (2d Cir. 1969). In the language of Judge Smith '*The course of the government smacks too much of a trial by ambush, in violation of the rules.*' To be sure, Baum's attorney did not make a very forceful showing in the district court of what cross-examination or rebuttal material he could secure. But in a case so close as this, we would rather give the defendant the benefit of the doubt than let the Government reap even a slight possibility of benefit from what we regard as a lack of candor unworthy of a prosecutor.
>
> Here, no reason for nondisclosure was advanced by the government. Greenhalgh's testimony was crucial to the prosecution; it was equally crucial to the defense. *Cf. Roviaro v. United States,* 353 U.S. 53, 60, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *United States ex rel. Wilkins,* 326 F.2d 135, 140 (2d Cir. 1964)" (emphasis ours).

See too, Coopedge v. United States, 369 U.S. 438, where the Supreme Court of the United States cautioned (*id.* at 449):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, *eminently* fair and sober criminal law procedures. The *methods we employ in the enforcement of our criminal law* have aptly been called the measures by which the *quality of our civilization may be judged.*" (Emphasis ours.)

In *Mesarosh v. United States,* 352 U.S. 1, 9, 14, the Supreme Court reminded prosecutors that the federal courts have supervisory powers over the conduct of criminal trials. Thus, the Supreme Court declared:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

We have pointed out previously in this brief that the crime, if any, committed by the witness Bowman, was a local transgression at the most. The testimony about an alleged payment to him, or payments to him, really had no place in this grand jury proceeding. The grand jury was investigating "RICO" violations, but did not tell that to Bowman. Indeed, they had indicated that they were investigating only bankruptcy fraud, and in that connection, possible bribery to public officials. In addition, they were perhaps investigating an arson. There was no indication, as suddenly appeared on the second occasion when Bowman was subpoenaed to testify, that the inquiry related to other subject matter.

In *United States v. Remington,* 191 F. 2d 246 (2 Cir. 1951), *cert. denied,* 343 U.S. 907, this Court held that it was an abuse of the process to convene a grand jury for the purpose of intimidating a witness. There is no doubt that in the case at bar the testimony of Bowan could not have related to bankruptcy fraud or "RICO" violations or the like. They were trying to get him to say that illegal payments had been made, and they were quite certain that he would repeat his testimony of his October appearance, and yet he was summoned before a second grand jury, we submit solely to harass and intimidate him. The testimony sought was wholly irrelevant to the matter under investigation, as we have previously detailed.

The petitioner was questioned during the case about a number of personal aspects of his life, which we believe were calculated to prejudice the jurors against him. This, we submit,

warrants dismissal of the indictment [*United States v. Whitted,* 325 F. Supp. 520 (D.C. Neb. 1971); and *United States v. DiGuanzia,* 213 F. Supp. 232 (Ill. 1973)].

We maintain further that the evidence in the case at bar was insufficient to have warranted presentment to the jury at all. The court should have dismissed it on the grounds of irrelevancy and insufficiency of evidence and on the other grounds alleged herein. This would be in accord with this court's decision in *United States v. Taylor,* 464 F. 2d 240 (2 Cir. 1972).

In *Taylor,* this court explained, *inter alia,* at 242:

> "It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See Capital Traction Company v. Hof, 174 U.S. 1, 13-14, 19 S. Ct. 580, 43 L. Ed. 873 (1899). Before submitting the case to the jury, the judge must determine whether the proponent has adduced evidence sufficient to warrant a verdict in his favor. Dean Wigmore considered, 9 Evidence § 2494 at 299 (3d ed. 1940), the best statement of the test to be that of Mr. Justice Brett in Bridges v. Railway Co. [1874] L.R. 7 H.L. 213, 233:
>
> [A]re there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?
>
> It would seem at first blush—and we think also at second—that more 'facts in evidence' are needed for the judge to allow men, and now women, 'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held

> to be constitutionally required in criminal cases. In re Winship, 397 U.S. 358, 361-364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). We do not find a satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

In the case at bar, we submit that the trial court had ample reason to grant the timely motion made by defense counsel under the *Taylor* case, to preclude this case from going to the jury altogether.

III.

SINCE THE INDICTMENT HEREIN REALLY CHARGED A SINGLE OFFENSE IN TWO SEPARATE COUNTS, THE DOCTRINE OF MULTIPLICITY SHOULD HAVE COMPELLED THE TRIAL JUDGE TO AT LEAST DISMISS THE SECOND COUNT, EVEN ASSUMING, *ARGUENDO,* THAT THE FIRST COUNT WAS VIABLE.

Three terms are often used and confused in connection with criminal joinder, and these are "misjoinder, duplicity, and multiplicity". Misjoinder is the inclusion in a single indictment of offenses or defendants that Rule 8 does not permit to be joined. [*United States v. Goodman,* 285 F. 2d 378, 379 (C.A. 5, 1960), *cert. denied,* 366 U.S. 930].

Duplicity is the joining in a single count of two or more distinct and separate offenses. [*United States v. Gibson,* 310 F. 2d 79, 80 (2 Cir. 1962)].

Multiplicity is the charging of a single offense in several counts [*United States v. Lubomski,* 277 F. Supp. 713, 716, n.2 (D.C. Ill. 1967)].

The record is replete with arguments and motions by the defense that a single charge was warranted and that the indictment was multiplicitious, because really only one act of perjury could be alleged.

While we strenuously maintain that no perjury was spelled out because the petitioner's answers on both occasions were consistent and the record before the grand jury on May 6, 1980 showed no contradiction, we nevertheless submit that under any circumstances only one count was warranted. The petitioner stated that he received no payments (bribes) from anyone and that covered the entire gamut of the questioning. The refinement of that question and answer by dissecting it into several different questions, all pertaining to the same issue, did not warrant the adding of any counts.

That Bowman was prejudiced by the multiple counts is seen from the fact that his fines were consecutive rather than concurrent, which is one aspect of punishment. The entire thrust of the questioning was aimed at determining whether Bowman received a bribe or bribes. His categorical answer that he did not covered the entire gamut of questioning.

The vice of multiplicity is the charging of a single crime in multiple counts. This is a violation of Rule 4 of the Federal Rules of Criminal Procedure because of misjoinder of counts. The virtue of that rule is that it diminishes the probability of double punishment and the obliquy of multiple charges for the same alleged misconduct. [*North Carolina v. Pearce*, 395 U.S. 711 (1969)].

Thus it was a substantial error of due process proportions for the trial court to compel petitioner to proceed to trial under fragmented charges. The prejudice derives from the fact that the duplication of charges always magnifies criminal liability in the eyes of the jury.

The concurrency of prison sentences notwithstanding, may very well have impelled the court to impose a more severe sentence because of the multiple counts and, as we have already indicated, resulted in a double fine.

The legal realm of multiplicity is sparsely populated with legal authorities. For instance, this Court has charted a course across virtually every province of the criminal law and yet it has

not spoken on the subject of multiplicity.[3] A sustained judicial neutrality on this crucial issue is bound to sponsor further abuse. This case, more than any other, offers the court an excellent opportunity for taking corrective action.

The test applied by our courts to determine the number of separate criminal offenses that can be carved out of a single transaction is whether the same evidence is required to sustain each charge. If not, then the fact that a number of charges relate to and grow out of one transaction does not make a single offense where two are defined by statute. *Bell v. United States,* 349 U.S. 81 (1955); *In re Snow,* 120 U.S. 274 (1887).

Prosecutors should not be allowed to scramble or garble their questions in such a fashion so as to proliferate perjury charges, as demonstrated in this case. In 1970, the Ninth Circuit came directly to grips with this issue in *Gebhard v. United States,* 422 F. 2d 281 (9th Cir. 1970), dealing with the famous Friar's Club fraud in Los Angeles. There the court, in a locomotive opinion, that cuts straight through the ambiguities of multiplicity, stressed in unmistakable language:

> "On the other hand, we do not think it proper that the government bludgeon a witness who is lying by repeating and rephrasing the same question, thus creating more possible perjury counts" (422 F. 2d at 289-90).

After illustrating the counts it found to be multiplicitious, the court decreed:

> "We are of the opinion that only one count in each of these groups should be allowed to stand. Otherwise a prosecutor could run up a possible perjury sentence indefinitely merely by repeating the same question. Single punishment for a single lie should suffice" (422 F. 2d at 290).

---

3. In *United States v. Dixon,* Docket No. 75-1317 (2d Cir., March 12, 1976), the court was on the verge of finding the duplication of SEC charges in mail fraud counts as multiplicitious but avoided that determination by dismissing the mail fraud counts because of insufficient proof. But *see United States v. Doolan, supra.*

The Sixth and Eighth Circuits have come to the same conclusion, holding that the offense of perjury may not be compounded by the repetitious asking of the same question. *United States v. Lazaros,* 480 F. 2d 174 (6th Cir. 1973); *Masinia v. United States,* 296 F. 2d 871 (8th Cir. 1961).

The major reason that the prosecution should be required to make a selection among multiplicitious counts is to promote an efficient trial and avoid the risk that a "prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes". *United States v. Mamber,* 127 F. Supp. 925, 927 (D. Mass. 1955).

Our case fits well within these authorities. For the evidence needed to convict under each of these counts was identical.

Accordingly, petitioner has met the test dealing with multiplicity and is entitled to a reversal.[4]

The trial court's failure to dismiss the superfluous counts of this indictment gravely prejudiced the petitioner and must have influenced the court when it imposed sentence, authorizing a reversal of petitioner's conviction. *United States v. Mancuso,* 485 F. 2d 275 (2d Cir. 1973). Surely, the policy served by the rule against multiplicity would be better promoted if the court struck down such defective indictments. Otherwise, the doctrine against multiplicity will become a myth. For all these reasons, the petitioner's judgment of conviction should be reversed and a new trial should be granted.

---

4. Although admittedly there is less anxiety and ordeal when the blows of criminal accusation are delivered at once, one can hardly say that one is not unduly punished, hurt or embarrassed when a defendant receives several convictions. The collateral effects of a conviction, independent of the sentence, are many and varied. *See* Note, *Collateral Consequences of a Criminal Conviction,* 23 Va. L. Rev. 929 (1970); Note, *Civil Disability of Felons,* 53 Va. L. Rev. 403 (1967); *Sibron v. New York,* 392 U.S. 40 (1968). Nor are the harmful consequences eradicated by the vacation of other sentences. For several states permit the use, for purposes of credibility of a witness, of a verdict of guilty upon which no judgment has been entered or sentence passed. *See Annot.,* 14 A.L.R. 3d 1272 (1967). Moreover, even if no other disability were incurred, there is always an extra stigma imposed upon one's reputation.

A. The court erred in not granting the motions of the defense and exacerbated this error by refusing to charge the jury on the issue of "value" of any item given to Bowman.

While we maintain that the court erred in several respects in refusing to grant the several motions of the defense to dismiss the indictment entirely, and, short of that, to dismiss one count to avoid multiplicity, the court exacerbated the prejudice to Bowman by refusing to charge the jury on the question of value of any item he may have received. For example, there was some testimony that the petitioner had received produce in the forms of fruits, vegetables, or cold cuts, on one or more occasions. In fact, Bowman indicated that he may have accepted "cold cuts". This however, should not have remained in the case on the question of perjury since the indictment was obviously addressed to payments of money of more than de minimus amounts (5.150-5.154; 131a-136a).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK

McCORMICK and DAMIANI
Attorneys for Petitioner

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Due Process Clause of the Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

2. 18 U.S.C. §152, Concealment of assets; false oaths and claims; bribery:

> "Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor; or
>
> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11; or
>
> Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty or perjury as permitted under section 1746 of title 28, United States Code, in or in relation to any case under title 11; or

Relevant Constitutional and Statutory Provisions

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forebearing to act in any case under title 11; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a debtor; or

Whoever, after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court entitled to its possession, any recorded

information, including books, documents, records, and papers, relating to the property or financial affairs of a debtor.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

3. 18 U.S.C. §1623, False declarations before grand jury or court:

"(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

4. 18 U.S.C. §1951, Interference with commerce by threats or violence.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in

commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of inquiry, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such

State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45."